EXHIBIT 4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALTERRA AMERICA INSURANCE CO., Plaintiff, v. NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Index No. 652813/2012 **E** Hon. Andrea Masley Hon. Michael Dolinger – Special Referee
DISCOVER PROPERTY & CASUALTY COMPANY, et al., Plaintiffs, v. NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Index No. 652933/2012 **E**

INSURERS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF UNDERLYING LITIGATION AND SETTLEMENT MATERIALS

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I. PRELIMINARY STATEMENT

In opposing three motions to compel filed by the Insurers, the NFL Parties continue their unflagging effort to avoid producing any substantive documents in connection with head trauma-related litigation. Despite being sued by more than 5,000 plaintiffs in over 300 Underlying Lawsuits alleging fraud, conspiracy, and negligence, the NFL Parties managed to avoid producing any documents in discovery in the Underlying Lawsuits. Instead, in the absence of any discovery, they entered into an uncapped class settlement that will pay out benefits over the course of 65 years and has generated settlement payments of over $500 million in the first year alone, with hundreds of millions (at least) more expected to follow. The NFL Parties' efforts to obscure the facts continue in this case. They now seek to thwart the Insurers' attempt to obtain material and necessary discovery in this insurance coverage action, hoping to satisfy their discovery obligations by producing publicly-filed pleadings from the Underlying Lawsuits, news articles, and insurance documents. The NFL Parties' tactics to avoid and delay discovery must be put to an end.

There is nothing "extraordinary" about the Insurers' requests for the NFL Parties' underlying defense files. Case law from New York and elsewhere makes clear that insurers and their policyholders have a common interest in the evaluation of the underlying claims, defenses, liability and damages as well as the negotiation of an underlying settlement such that the Insurers are within the group to which the privilege extends. The materials at issue, therefore, can be produced to the Insurers in this litigation without waiver of any privilege or immunity as to third parties. Given this common interest, courts routinely order production of these types of files in coverage litigation. The NFL Parties cannot accept almost $20 million in defense payments, and claim many millions more in indemnity for the Settlement, yet refuse to turn over the work product and communications relating to those defense and settlement efforts.

Even if some privilege or immunity did apply as respects the Insurers, the NFL Parties waived those protections by placing the requested materials "at issue" in this lawsuit by asserting causes of action for breach of the duty to defend, breach of the duty to indemnify, and "bad faith" failure to consent to the Settlement against various Insurers. The NFL Parties cannot establish their claims against the Insurers, and the Insurers cannot properly defend against such claims, without reference to the defense and settlement materials. The NFL Parties also cannot be permitted to unilaterally select a limited set of defense and settlement materials to produce in this litigation while refusing to disclose the remaining universe of relevant documents.

Nor can the NFL Parties avoid their discovery obligations with the argument that the Insurers can obtain some relevant information from third-party discovery sources. Even if certain non-parties possess other potentially relevant information (and are willing to comply with subpoenas for responsive documents), the information and documents in the NFL Parties' own files are of independent importance to the coverage issues presented in this lawsuit, including what the NFL Parties knew in evaluating and settling the underlying claims. In addition, any reliance upon third-party discovery sources is particularly inappropriate here because the NFL Parties have injected themselves into the subpoena process by insisting upon a "privilege review" of responsive documents in the possession of unrelated third parties. The NFL Parties' conduct has delayed and hindered the receipt of relevant information and likely will result in separate motion practice.

The Insurers have engaged in extensive meet-and-confer efforts with the NFL Parties since May 2017. The parties advised the Court that they reached an impasse on this issue more than six months ago. Despite all efforts to resolve this matter without Court involvement, this motion practice was necessary. The NFL Parties must not be permitted to persist in their discovery strategy of avoidance and delay.

II. FACTUAL BACKGROUND

The Insurers provided a detailed statement of relevant facts in their moving brief but provide some additional facts in response to the NFL Parties' opposition brief.

A. NOTICE OF THE UNDERLYING LAWSUITS TO THE INSURERS

The NFL Parties first provided notice of the Underlying Lawsuits to their Insurers through their broker, Marsh. By way of example, TIG received an August 6, 2011 cover letter from Marsh enclosing an August 2, 2011 letter from the NFL Parties in connection with the Vernon Maxwell lawsuit. See Ex. A.[1] The NFL Parties' letter instructed Marsh to notify their insurers of the lawsuit but specifically stated that the "NFL and NFL Properties are still studying the Complaint and considering the engagement of defense counsel." Id.

Neither the August 6, 2011 cover letter nor the August 2, 2011 letter from the NFL Parties requested that the Insurers assume the defense of the lawsuits or assign defense counsel. To the contrary, the NFL's letter made clear that the NFL Parties were selecting counsel and "reserving all rights" under the policies. Id. Subsequent notice letters from the NFL Parties expressly stated that the Paul Weiss firm would serve a defense counsel. See, e.g., Ex. B. Subsequent offers to provide and pay for separate and independent counsel to represent NFL Properties were either specifically rejected or ignored by the NFL Parties. See Ex. C and D. The NFL Parties unilaterally hired the defense counsel of their choice without any Insurer input, selecting a firm that has historically represented them in litigation and which charges rates exponentially higher than the Insurers' standard defense counsel rates.

[1] Citations to exhibits are to the Affirmation of Heather E. Simpson ("Simpson Aff.") submitted with this reply brief unless otherwise noted.

B. PAYMENT OF DEFENSE COSTS

The NFL Parties' notice letters to the Insurers did just that—they put the Insurers on notice of the lawsuits, reserved "all of [the NFL Parties'] rights and remedies under the law, at equity, and under any and all potentially applicable insurance policies," but, significantly, did not ask the Insurers to assume the defense of the lawsuits or to assign counsel. See Ex. A. In response, the Insurers issued various reservation of rights letters. Just like the NFL Parties, the Insurers reserved all rights under the policies and the law. The primary Insurers whose policies contain a defense obligation agreed to defend one or both of the NFL Parties subject to a reservation of rights as set forth in their respective letters. The assertion of these (reciprocal) reservations of rights does not equate to a denial of coverage.

The NFL Parties contend that they had incurred "at least $6,000,000 in connection with the defense of the underlying tort action" as of June 18, 2012 but that the first defense payment received from the Insurers was TIG's check dated June 22, 2012. NFL Opp. Br. at 5; Watson Aff. ¶ 10. This apparent attempt to imply delay by the Insurers is entirely misleading. The defending Insurers were not provided with defense invoices until many months after the NFL Parties provided notice of the Underlying Lawsuits. TIG did not receive defense invoices until mid-April 2012. See Simpson Aff. at ¶ 15. The Insurers cannot be obligated to pay costs for which they had no invoices, much less the opportunity to review them. TIG began issuing its pro rata share of the defense costs in June 2012 despite not yet having a complete set of invoices and, by August 8, 2012, TIG had paid more than $1.2 million towards the NFL Parties' defense. See Simpson Aff. at ¶ 16. To date, the defending Insurers have paid more than $17 million on behalf of the NFL Parties in connection with the Underlying Lawsuits. See Watson Aff. at ¶ 17.

C. THE MEET-AND-CONFER PROCESS

On May 31, 2017, the Insurers sent their first discovery deficiency letter to the NFL Parties, which expressly identified the NFL Parties' failure to produce their defense and settlement materials, among many other issues. That correspondence was sent almost ***fifteen*** months before the Insurers filed their current motion to compel. During that lengthy time period, the Insurers as a group sent at least three formal deficiency letters that specifically addressed this issue and participated in numerous telephone conferences with the NFL Parties' counsel, including two official meet and confer sessions that lasted a total of approximately six hours. See Simpson Aff. at ¶ 17-18. Individual insurers also corresponded with the NFL Parties regarding discovery disputes and resolutions during this period. See Insurers' Omnibus Reply Br. at 2, Almond Aff., Exs. A-H. Throughout this process, the Insurers raised numerous arguments as to why the NFL Parties were required to produce the underlying defense files, including, as a threshold basis, that such documents were not privileged as respects the Insurers. See Ex. K to Moving Br., 5/31/17 Ltr. at 4 ("documents relating to the underlying defense efforts . . . are not privileged"); 10/11/17 Ltr. at 3 ("As we have discussed on numerous occasions, it is the Insurers' position that such documents are not privileged . . . ."); 1/17/18 Ltr. at 2 ("such documents are neither privileged nor protected as respects the Insurers").

The Insurers also raised the need for underlying defense and settlement documents with Justice Masley's clerk in early 2018. Upon the Court's instruction, the Insurers worked with the NFL Parties to prepare a joint status letter outlining the pending discovery disputes for which the parties had reached an impasse and sought assistance from the Court in February 2018. See Ex. L to Moving Br. The Insurers' request for underlying defense files and settlement materials was included in that list. Id.

By letter dated June 1, 2018, the parties submitted a joint letter to the Special Referee advising of certain discovery disputes, including the defense file issue, for which the parties had reached an impasse. See. Ex. E. During the June 15, 2018 conference with the Special Referee, counsel for both parties confirmed that a briefing schedule would be set for the issues identified in the joint letter.

III. ARGUMENT

A. THE NFL PARTIES CANNOT SATISFY THEIR DISCOVERY OBLIGATIONS BY PRODUCING VOLUMES OF PUBLICLY-AVAILABLE MATERIALS

In all three of its opposition briefs to the Insurers' motions to compel, the NFL Parties claim satisfaction of their discovery obligations simply because they already have produced more than pages of documents. But mere volume does not satisfy a litigant's discovery obligations. Review of the substance (or lack thereof) of the NFL Parties' production reveals its inadequacy and supports the Insurers' position that the defense and settlement documents are material and necessary to the claims and defenses in this action.

Based upon the Insurers' review,

REDACTED

Once one strips away the underlying pleadings, news articles, and insurance materials, the remaining production is nearly devoid of substance about the actual allegations (spanning five decades of conduct), defenses, and damages at issue in the Underlying Lawsuits, which are

necessary to the Insurers' ability to evaluate and litigate the NFL Parties' claims for coverage in this litigation. Tellingly, although the NFL Parties recite a laundry list of categories of substantive materials they purportedly have produced in response to the Insurers' requests, they do not include any corresponding exhibits or even Bates ranges for such documents. In truth, the produced documents pertaining to these categories of relevant information are few and far between.

As litigants in a complex commercial lawsuit, the Insurers are entitled to broad discovery from the NFL Parties. For the reasons discussed in the Insurers' moving brief and herein, the underlying defense and settlement documents are both material and necessary to this case and relevant to the issues to be adjudicated and have been placed at issue by the NFL Parties' own assertion of claims. The NFL Parties cannot simply rely upon a voluminous universe of publicly-available materials as a substitute for a meaningful and responsive document production.

B. DISCLOSURE OF THE NFL PARTIES' DEFENSE AND SETTLEMENT MATERIALS TO THE INSURERS DOES NOT CONSTITUTE A WAIVER OF PRIVILEGE

Two items are particularly striking about the NFL Parties' arguments on privilege. First, the NFL Parties inexplicably assert that the Insurers' raised the contention that the attorney-client privilege and work product doctrine do not apply to them "for the very first time" in this motion. This is demonstrably false. As set forth above, the Insurers have consistently argued for at least the last year-and-a-half that the defense file is not privileged or protected material as respects the Insurers, several of which have funded almost $20 million in defense costs to date. In particular, the Insurers raised this argument in their May 31, 2017, October 11, 2017, and January 17, 2018 letters, as well as on numerous telephone conferences. Thus, the inapplicability of any privilege preventing disclosure of the defense materials to the Insurers has been articulated to the NFL Parties for over a year and does not represent a "new" position.

Second, the NFL Parties mischaracterize the Insurers' position with respect to the policies' "cooperation clauses" as a contention that these clauses effectively mandate a "waiver" of the privileges and protections over the NFL Parties' defense and settlement materials. This is incorrect. The Insurers' primary position is that the NFL Parties properly may produce the defense and settlement materials to the Insurers ***without*** any waiver of privilege due to the tripartite relationship between insurer, insured, and defense counsel permitting such a waiver-free exchange. The Insurers agree that those materials remain privileged as to third parties outside of the tripartite relationship and reiterate that a strict Protective Order already exists in this case.

The case law supports the Insurers' argument in this regard. See Goldberg v. Am. Home. Assurance Co., 80 A.D.2d 409, 413 (1st Dep't 1981) ("[W]hen an attorney acts for two different parties having a common interest, communications by either party to the attorney are not necessarily privileged in a subsequent controversy between the two parties. This is especially the case where an insured and his insurer have a common interest in defending an action against the former, and there is a possibility that those communications might play a role in a subsequent action between the insured and his insurer.") (internal citations omitted); Md. Cas. Co. v. W.R. Grace & Co., 1994 U.S. Dist. LEXIS 15322, at *17-20 (S.D.N.Y. Oct. 26, 1994) (affirming decision of Magistrate Judge to require production of policyholder's underlying attorney-client and work product material to primary and excess insurers under common interest theory).

Even the New York case law relied upon by the NFL Parties supports the Insurers' position. Many of the cases cited by the NFL Parties to rebut the common interest doctrine are in the context of reinsurance disputes. The First Department has noted the "stark contrast" between a reinsurance relationship and an insurer-insured relationship, particularly where the insurer is defending its policyholder. See Am. Re-Ins. Co. v. U.S. Fid. & Guar. Co., 40 A.D.3d 486, 491 (1st Dep't 2007)

("[T]he relationship between an insured and insurer stands in stark contrast to a relationship between an insurer and reinsurer. To begin with, an insurer is obligated to defend the insured, whereas a reinsurer has no such duty."); N. River Ins. Co. v. Columbia Cas. Co., 1995 U.S. Dist. LEXIS 53, at *11-13 (S.D.N.Y. Jan. 5, 1995) (acknowledging general application of common interest doctrine where insurer is defending insured in underlying litigation).

The fact that the Insurers did not directly retain counsel to defend the NFL Parties does not destroy the common interest between them. Moreover, the NFL Parties' statement that they "had no choice" but to retain their own defense counsel is entirely disingenuous. NFL Opp. Br. at 4. The NFL Parties' notice letter to its broker, as relayed to the Insurers, expressly advised that the NFL Parties were considering their selection of counsel and did not request that the Insurers assign counsel. The NFL Parties ***did not want*** the Insurers to retain counsel or assume control the defense, as reflected by their rebuff of Travelers' offer to retain and pay for separate counsel to represent NFL Properties. See Ex. D. Nevertheless, several of the Insurers have been paying substantial defense costs on behalf of the NFL Parties for their chosen counsel. As the NFL Parties concede, TIG alone has paid almost $10 million in defense costs, and the Insurers collectively have funded more than $17 million, with substantial costs still being incurred. The NFL Parties cannot use privilege as a means to avoid sharing the very work product paid in significant part by the Insurers.

The NFL Parties' attack on Waste Management, Inc. v. International Surplus Lines Ins. Co., 579 N.E.2d 322 (Ill. 1991), does not alter this conclusion. Although the Waste Management court took a more strident position, numerous other courts have acknowledged an insurer's right to obtain underlying defense materials pursuant to the common interest doctrine and the policyholder's duty to cooperate under the insurance contract. The criticism of Waste Management focuses primarily upon the automatic application of the common interest doctrine

despite the fact that none of the insurers in that case provided a defense in the underlying litigation, participated in the defense in any way or had any communications with defense counsel. Id. at 194-95; see N. River, 1995 U.S. Dist. LEXIS 53, at *11 ("[T]he determination of whether the common interest doctrine applies cannot be made categorically.")

By contrast, the NFL Parties have received almost $20 million in defense payments from certain Insurers to fund the work performed by the NFL Parties' choice of counsel. As the NFL Parties seek to emphasize, all of the Insurers participated in "dozens of in-person and telephonic briefings by defense counsel from the Paul Weiss firm, during which the NFL Policyholders' lawyers provided confidential updates on the ongoing tort litigation and settlement negotiations." NFL Opp. Br. at 6. The Insurers sent numerous letters to the NFL Parties inquiring about defense and settlement strategy and identifying questions or concerns about the Settlement, many of which went without satisfactory response. The NFL Parties shared certain drafts of the Settlement with the Insurers and formally requested the Insurers' consent to the Settlement. Although the Insurers disagree that they received sufficient information and documents from the NFL Parties to properly evaluate the Underlying Lawsuits and Settlement (as reflected by the current motion practice), it is undisputed that the Insurers participated in the defense and/or settlement efforts and fall within the umbrella of the common interest exception to the attorney-client privilege. It is also clear that the NFL Parties would prefer to be the unilateral arbiter of which carefully-curated privileged materials they will share with the Insurers when it suits their interests rather than comply with their contractual and discovery obligations. Such a result does not comport with common fairness or New York law. The NFL Parties cannot have it both ways.

To the extent that the Insurers were not "side-by-side, at the same table" with the NFL Parties in the settlement negotiations (NFL Opp. Br. at 22), it was due to the NFL Parties' refusal

to treat the Insurers as partners, and their decision to restrict the flow of information to scripted and sanitized reports and briefings (including only one defense evaluation report that the Insurers were permitted to review on a read-only basis for a limited time in the presence of a chaperone provided by the NFL Parties).

In sum, the NFL Parties must produce all of the responsive documents pertaining to the defense and settlement of the Underlying Lawsuits. Such materials are not "privileged" or "protected"[2] from the Insurers because they fall within the well-established common interest exception under New York law. Therefore, the NFL Parties should be compelled to produce the responsive defense and settlement materials.

C. THE NFL PARTIES HAVE PLACED THE DEFENSE AND SETTLEMENT MATERIALS AT ISSUE

Even if the NFL Parties did have a valid claim of privilege or immunity as to the Insurers, they have waived those protections by placing the materials "at issue" in this case. Once again, the NFL Parties oversimplify the Insurers' argument. The Insurers do not assert that, solely by virtue of seeking coverage from the Insurers, the "at issue" doctrine applies. To the contrary, it is the specific claims and defenses raised by the NFL Parties in this action that require reference to and, thus, necessitate production of the underlying defense and settlement documents. It would unfairly impede the Insurers' defense to the NFL Parties' claims for coverage if the NFL Parties are permitted to withhold these documents.

[2] Throughout their brief, the NFL Parties refer to their production of "non-privileged and non-protected" documents. The Insurers understand from meet-and-confer efforts that "non-protected" refers to documents that do not fall within the work product immunity. If the NFL Parties assert any other "protection" over responsive documents, they should be required to identify the basis for such alleged protection(s).

1. The NFL Parties' Claims and Defenses Require Reliance Upon the Defense and Settlement Materials

Both the attorney-client privilege and work product doctrine can be deemed waived where "invasion of the privilege is required to determine the validity of the client's claim or defense and application of the privilege would deprive the adversary of vital information." Royal Indem. Co. v. Salomon Smith Barney, Inc., 2004 N.Y. Misc. LEXIS 1052, at *24-25 (N.Y. Sup. Ct. June 29, 2004). As set forth in a case cited by the NFL Parties, the "at issue" doctrine applies under New York law where:

> (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through the affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.

AIU Ins. Co. v. TIG Ins. Co., 2008 U.S. Dist. LEXIS 96693, at *12 (S.D.N.Y. Nov. 25, 2008). Each of these factors is satisfied here.

First, the NFL Parties have taken the affirmative act of pursuing a claim for coverage against the Insurers and filing causes of action in this lawsuit for breach of the duty to defend (against certain primary Insurers), breach of the duty to indemnify (against many of the Insurers), declaratory relief as to the duty to indemnify (against all Insurers), and bad faith refusal to consent to the Settlement (against the "non-consenting" Insurers). In discovery in this lawsuit, arising from the NFL Parties' own claim for coverage, the NFL Parties have objected to producing a large universe of highly relevant information on the basis of the attorney-client privilege and work product doctrine.

Second, through the affirmative act of suing the Insurers for various causes of action and raising certain affirmative defenses to the Insurers' claims, the NFL Parties have put the protected information at issue "by making it relevant to the case." There can be no dispute that documents

and communications regarding the underlying defense and the Settlement are relevant to this case. For example, the NFL Parties claim that certain Insurers "have breached and continue to breach their contractual duties to provide a complete defense to the NFL and/or NFL Properties" in the Underlying Lawsuits. See Ex. M to Moving Br. at ¶ 72. To date, the NFL Parties have never disclosed how defense costs were allocated (or are being allocated) among the NFL and NFL Properties and the basis for any such allocation. The NFL Parties further claim that certain Insurers "have breached and continue to breach their contractual duties to indemnify the NFL and/or NFL Properties." See id. at ¶ 86. The NFL Parties also allege that they "are entitled to a judicial determination and declaration as to the rights and obligations of [all of] the Insurers with respect to the indemnification of the NFL and/or NFL Properties for costs incurred in connection with and damages imposed under the Class Settlement and the Amended Final Order and Judgment, and any other settlement or judgment that becomes final and effective in the Underlying Lawsuits." See id. at ¶ 93. Although the Settlement resulted in a release of all claims against both the NFL and NFL Properties, the NFL Parties have not provided any analysis of the respective liabilities (and defenses) of the NFL and NFL Properties. They also have not disclosed how the payments due under the Settlement are apportioned, if at all, between the NFL and NFL Properties and the legal basis for doing so.

The NFL Parties cannot establish a viable cause of action for an Insurer's failure to provide a "complete" defense of the Underlying Lawsuits or breach of an obligation to indemnify the "NFL and/or NFL Properties" for the Settlement, or even establish a right to declaratory relief, without establishing what defense and indemnity amounts are allegedly owed to the NFL and NFL Properties, respectively, and the basis for that allocation. The Insurers do not all insure both the NFL and NFL Properties for all policy periods. Therefore, any underlying communications or

documents reflecting the nature of the work performed by Paul Weiss, the respective liability and defenses of the NFL and NFL Properties, the respective damages faced by the NFL and NFL Properties, as well as the allocation of defense and Settlement costs, necessarily bear upon the NFL Parties' claims for breach of contract on the duty to defend and duty to indemnify. See Royal Indem., 2004 N.Y. Misc. LEXIS 1052, at *26 (explaining that the insured cannot establish entitlement to coverage "while at the same time refusing to disclose the information that would either prove or disprove the assertion"). Likewise, it is critical that the Insurers have access to information related to those issues in order to properly defend against the NFL Parties' breach of contract claims.[3]

In addition to establishing that each Settlement payment pertains to bodily injury that took place during the Insurers' respective policy periods and satisfying all other terms and conditions of the insurance contracts, the NFL Parties also must demonstrate that the Settlement was reasonable. See George Muhlstock & Co. v. Am. Home Assurance Co., 117 A.D.2d 117, 126 (1st Dep't 1986); In re Prudential Lines, Inc., 170 B.R. 222, 246 (S.D.N.Y. 2005). Injecting a substantive issue into a discovery motion, the NFL Parties start with the proclamation that it will be "virtually impossible" for the Insurers to contest the Settlement simply because the MDL court approved it within the context of a Rule 23 analysis under the Federal Rules of Civil Procedure. The Insurers will reserve a more robust discussion of this issue for the appropriate time but note two critical points. First, the NFL Parties can cite to no New York case stating that approval of a class action settlement under Rule 23 automatically renders ***every*** settlement – even an uncapped settlement expected to pay in excess of $1 billion dollars over 65 years without any showing of

[3] To be clear, the Insurers are ***not*** seeking (and have never requested) privileged communications with or work product of the NFL Parties' coverage counsel in this action.

causation by the claimants – to be "reasonable" for the purposes of insurance coverage. Second, the cases cited by the NFL Parties from other jurisdictions are distinguishable.[4]

The NFL Parties next argue that an "objective" standard applies to the determination of reasonableness. Again, this issue is not properly before the Special Referee on a discovery motion. In brief response, however, the Insurers note that the cases cited by the NFL Parties for this proposition involve a situation in which an insurer had declined coverage completely. Despite the NFL Parties' efforts to portray a denial of coverage by the Insurers, that is simply not the case. As the NFL Parties themselves concede, certain of the Insurers have funded nearly $20 million in defense costs on behalf of the NFL Parties and they continue to make payments to this day. Thus, any case law regarding the standard for reasonableness of a settlement in the face of an outright denial of coverage by an insurer is not relevant here. In any event, any objective "reasonable person" standard (if applicable) still would require an examination of the claims, defenses, and liability at issue in the Underlying Lawsuit. See, e.g., DH Holdings Corp. v. Marconi Corp. PLC, 809 N.Y.S.2d 404, 407 (Sup. Ct. Oct. 24, 2005) ("The heart of this matter is to determine if the settlement was appropriate, and, if so, was it reasonable; inquiries that, of necessity, place these documents at issue."); Royal Indem., 2004 N.Y. Misc. LEXIS 1052, at *26, n.7 (noting that contested issue of reasonableness warranted the production of the settlement-related documents).

[4] These cases, applying the law of other states, were in the context of insurers that wrongly denied a defense, settlements that were deemed reasonable during a hearing at which the insurer participated or circumstances where the insurer was not even contesting the overall reasonableness of the settlement. See Columbia Cas. Co. v. HIAR Holding, L.L.C., 411 S.W.3d 258, 265 (Mo. 2013) ("[T]he insurer that wrongly refuses to defend . . . cannot have its cake and eat it too by both refusing coverage and at the same time continuing to control the terms of settlement in defense of an action it had refused to defend"); Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc., 199 P.3d 376, 379 (Wash. 2008) (holding that an insurer could not challenge the reasonableness of a settlement that had been approved by the trial court where the insured had participated actively in the approval hearing and obtained a reduction of the settlement amount); Jostens, Inc. v. CNA Ins./Continental Casualty Co., 403 N.W.2d 625 (Minn. 1987) ("The Court of Appeals decision confuses the issue of reasonableness of settlement with the issue of how much of the settlement CNA is liable for under the policies. CNA is not challenging the amount of settlement but, rather, which amounts are covered under the policies.").

Finally, to prevail on their "bad faith" refusal to consent cause of action against certain of the Insurers, the NFL Parties must show not only that the Settlement was reasonable, but satisfy other burdens, including but not limited to that those Insurers' refusal to consent to the Settlement was unreasonable and resulted in damage to the NFL Parties. The NFL Parties cannot do so without disclosing information from the underlying defense files. Although the success of other sports organizations in defending against head trauma litigation may be a factor relied upon by the Insurers on the reasonableness issue, it certainly is not a substitute for information from the NFL Parties' files as to the reasons why the Settlement was consummated considering the specific claims and defenses at issue in the Underlying Lawsuits.[5]

In sum, the Insurers have demonstrated a substantial need for the underlying defense and settlement materials in light of the claims and arguments asserted by the NFL Parties in this action. See Charlotte Motor Speedway, Inc. v. Int'l Ins. Co., 125 F.R.D. 127, 130 (M.D.N.C. 1989) (concluding that the activities and advice of the policyholder's counsel in the underlying action were "inextricably interwoven with the issue of [the insurer'] liability under the Policy" and that exception to work product protection applied). The need for these documents is particularly acute here given the lack of ***any*** discovery conducted in the Underlying Lawsuits. The Insurers' purported breach of the duty to defend or the duty to indemnify and/or their "bad faith" refusal to consent to the Settlement cannot be judged upon the Insurers' own files because the Insurers were not provided with any underlying deposition transcripts, document productions or expert reports (as in the ordinary course of defending a case) to equip them with information necessary to

[5] The Insurers believe the underlying defense file materials could well show that the Settlement was not reasonable. However, even in the event these materials support the reasonableness of the Settlement (e.g., counsel's evaluation revealed liability concerns based upon unfavorable information and documents in the NFL Parties' possession reflecting knowledge of long-term risks of head trauma by the NFL Parties), this too would bear on the coverage issues, including the Insurers' knowledge-based defenses.

determine the reasonableness of the Settlement or whether any particular claim implicated coverage under their Policies. Therefore, the NFL Parties must produce this relevant and responsive universe of documents. [6]

2. The NFL Parties Cannot Selectively Waive Privilege

The NFL Parties contend that they are not putting privileged information "at issue" in pursuing their claims against the Insurers. For the reasons discussed herein, that contention is not accurate. In addition, even the case law cited by the NFL Parties makes clear that "selective disclosure is not permitted as a party may not rely on the protection of the privilege regarding damaging communications while disclosing other self-serving communications." Deutsche Bank Trust Co. of Ams. v. Tri-Links Inv. Trust, 43 A.D.3d 56, 64 (1st Dep't 2007).

The NFL Parties have provided certain Insurers with limited pieces of attorney-client/work product protected material in connection with the underlying defense and Settlement. These documents are subject to the NFL Parties' pending Motion for a Protective Order. Subject to their request for certain protections from the Special Referee, the NFL Parties intend to rely upon these cherry-picked documents in support of their claim that the Settlement was reasonable and covered under the Insurers' policies. How they simultaneously can dispute they have placed the defense file materials at issue is beyond reason. The NFL Parties cannot be permitted to produce and rely upon privileged materials in support of their case while, at the same time, refusing to produce the remainder of the relevant materials.

Unlike the parties in the cases denying production of the underlying defense and settlement materials, the NFL Parties seek to selectively waive privilege and rely upon certain privileged

[6] The Insurers duly note the NFL Parties' suggestion that information regarding the defense and Settlement can be obtained by way of deposition of defense counsel, however, the file materials are relevant and necessary for the same reasons. See NFL Opp. Br. at 28, citing JP Morgan Secs. Inc. v. Vigilant Ins. Co., 51 N.Y.S.3d 369, 381 (N.Y. Sup. Ct. 2017) (noting that policyholder had "permitted extensive interrogation" of its underlying defense counsel).

materials in support of their claims or defenses in this action. See Deutsche Bank, 43 A.D.3d at 65 ("Bankers Trust has not premised its claims . . . on the legal advice it received in the WMI action, nor has Bankers Trust made any self-serving, selective disclosure of any protected material."); AIU, 2008 U.S. Dist. LEXIS 96693, at *13-14. The NFL Parties cannot reap the benefit of producing and relying upon certain privileged documents in support of their case but deprive the Insurers of access of other responsive and relevant documents necessary to respond to the NFL Parties' claims.

3. There is No Other Source for the Requested Information

The theme of the NFL Parties' opposition is that the Insurers "face no limitations" in developing arguments bearing on reasonableness because of the "extensive public record" to which they already have access. NFL Opp. Br. at 27, 29. Amazingly, the NFL Parties go so far as to highlight the numerous subpoenas served on third parties by the Insurers. Given the magnitude of this case, both in monetary amount and the nature of the underlying allegations claiming misconduct by the NFL Parties going back many decades, it is only natural that the Insurers would seek information from third parties, including the NFL Member Clubs, doctors associated with the NFL's medical committees, and other sources. The pursuit of that discovery, which is well within the rights of the Insurers, in no way relieves the NFL Parties' of their own discovery obligations in this action.

Equally as troubling, despite pointing the finger at third-party subpoenas as an ample source of information, the NFL Parties have deliberately interfered with the Insurers' ability to obtain information from those sources. The Insurers have served subpoenas on 59 entities over the last year. To date, only four entities have made limited document productions—three medical organizations and Dr. Elliot Pellman, the former chair of the MTBI Committee. Notably, counsel

for Dr. Pellman (and all of the other doctors served with subpoenas by the Insurers) have taken the position that any responsive documents should be sought, in the first instance, from the NFL Parties and that any third-party discovery should only take place once "first-party" discovery from the NFL Parties is "complete."). See Ex. F. Counsel for the subpoenaed doctors also advised the Insurers that responsive documents in Dr. Pellman's possession were being withheld until the NFL could conduct a privilege review.

Putting aside the dubious nature of any "privilege" the NFL might have over documents in the possession of Dr. Pellman, the Insurers served a subpoena on Dr. Pellman on June 28, 2017 and still await this purported "privilege review" to be undertaken by the NFL so that all responsive materials can be obtained.[7] The Insurers have not yet received any documents from any of the other 22 doctors upon which they served subpoenas (all represented by the same counsel). Likewise, the Insurers served subpoenas on each of the 32 Member Clubs beginning in September 2017. To date, the Insurers have not received a single responsive document from the Member Clubs. The Member Clubs are represented by a single law firm and similarly argue that the responsive materials should be provided by the NFL Parties in the first instance or that the requests should otherwise be "prioritized" by the Insurers.

The Insurers anticipate that enforcement of one or more of the subpoenas will be another issue brought before the Special Referee in the near term. Regardless, the NFL Parties cannot hide behind third-party discovery sources, which have borne little fruit to date in part due to the NFL Parties' own involvement, as a basis to avoid fulfilling their own discovery obligations.

[7] On October 9, 2018, the Insurers received a modest supplemental production from Dr. Pellman consisting of approximately 3,900 pages, which the Insurers are in the process of reviewing. Initial review reveals that the earliest document is from 2003, despite Dr. Pellman's position on the MTBI Committee in the 1990's. Counsel for Dr. Pellman has not confirmed whether the production is now complete or if the NFL is still conducting any additional "privilege reviews" over responsive documents in Dr. Pellman's possession.

D. THE INSURERS' REQUESTS AND "MEET-AND-CONFER" EFFORTS WERE PROPER

The NFL Parties take issue with the Insurers' discovery requests on the basis that they are vague and overbroad. Over the last year, the Insurers have been explicit that they seek the defense file maintained by the NFL Parties and/or their defense counsel (primarily Paul Weiss). The Insurers also have identified several categories of information they would expect to see in the "defense file," including documents and communications relating to the evaluation and settlement of the Underlying Lawsuits, the evaluation of the NFL's and NFL Properties' respective liability, the reasonableness of the Settlement, all mediation statements, demands, offers and proposals made in connection with the Settlement, drafts of the Settlement, and reports or letters from any of the NFL Parties' experts. See, e.g., Ex. G to Moving Br. Ex., at Requests 28 and 29.

The NFL Parties complain that the Insurers "steadfastly refused" to explain what specific documents or categories of documents they need. Aside from the obvious list of "categories of documents" identified in the Insurers' Document Requests, it is not possible for the Insurers to be more specific because they do not know how the files of the NFL Parties (or Paul Weiss) are organized or what documents potentially exist. The Insurers do not bear the burden to specifically identify which documents may be responsive to their discovery requests when they do not have access to the NFL Parties' files.

Finally, the NFL Parties' attempt to defeat the Insurers' motion to compel on the basis that the Insurers have failed to engage in good faith meet-and-confer efforts is absurd. As outlined above, the Insurers engaged in extensive meet-and-confer efforts, both through formal correspondence and telephone conferences, to no avail. The parties also presented this issue to the Court in a list of items upon which they had reached an impasse over six months ago. See Ex. L to Moving Br. These meet and confer correspondences were identified in, and attached as exhibits

to, the Insurers' affirmation in support of their Motion to Compel. In addition, the parties met with the Special Referee, explained the discovery issues, and provided the same list of issues that was previously provided to the Court. If the NFL Parties believed that any issues were not yet ripe for a ruling, they had an opportunity to advise the Special Referee at that time.

Accordingly, the Insurers have more than satisfied their duty to "confer[] with counsel for the opposing party in a good faith effort to resolve the issues" prior to filing a motion to compel. 22 N.Y.C.R.R. § 202.7(a)(2). It is clear that the NFL Parties will seize any opportunity to delay discovery from proceeding in a meaningful way, however, the Insurers are not required to continue fruitless meet-and-confer efforts on an issue that has reached impasse many months ago. This issue is ripe for motion practice (as agreed by the parties in prior correspondence to the Court and Special Referee), and the Special Referee should rule on the substance of the motion at this time.

IV. CONCLUSION

The underlying litigation documents are both material and necessary to the issues to be determined in this case. The NFL Parties and their Insurers, some of which have incurred tens of millions of dollars in defense costs, share a common interest in the Underlying Lawsuits and Settlement that *de facto* preserves the privilege over any materials produced to the Insurers in this action. Alternatively, the NFL Parties have waived the privilege by placing these materials "at issue" in this lawsuit by way of the NFL Parties' causes of action against the Insurers. The Insurers request that the Special Referee grant their motion and compel the NFL Parties to produce the underlying litigation and settlement materials as requested.

Dated: October 11, 2018
New York, New York

KENNEDYS CMK LLP

/s/ Christopher R. Carroll

Christopher R. Carroll
Heather E. Simpson
Mark F. Hamilton
570 Lexington Avenue, 8th Floor
New York, New York 10022
T: (646) 625-4000
Attorneys for Defendants
TIG Insurance Company
The North River Insurance Company
United States Fire Insurance Company
Liaison Counsel for the Insurers

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X

ALTERRA AMERICA INSURANCE COMPANY, Index No. 652813/2012 **E**

Plaintiff,

-against-

AFFIRMATION OF HEATHER E. SIMPSON

NATIONAL FOOTBALL LEAGUE AND NFL PROPERTIES, LLC, et al.,

Defendants.

----------X

DISCOVER PROPERTY & CASUALTY COMPANY, et al., Index No. 652933/2012 **E**

Plaintiffs,

-against-

NATIONAL FOOTBALL LEAGUE, NFL PROPERTIES LLC., et al.,

Defendants.

---------- X

HEATHER E. SIMPSON, ESQ., an attorney duly admitted to practice before the courts of the State of New York, hereby affirms the following to be true and under penalty of perjury:

1. I am a partner of the law firm of Kennedys CMK LLP, counsel for Defendants TIG Insurance Company, The North River Insurance Company and United States Fire Insurance Company ("TIG"), in the above-captioned matter (the "Coverage Action"). As such, I have personal knowledge of the facts and circumstances contained herein, the source of my

knowledge being the records and files maintained by my office in the ordinary course of handling this matter.

2. I respectfully submit this Affirmation in support of the Insurers' Reply Memorandum of Law in Support of Motion to Compel Production of Underlying Litigation and Settlement Materials from the National Football League and NFL Properties LLC (the "NFL Parties").

3. The Insurers joining in this reply brief are as follows: TIG Insurance Company, The North River Insurance Company, United States Fire Insurance Company, Discover Property & Casualty Insurance Company, St. Paul Protective Insurance Company, Travelers Casualty & Surety Company, Travelers Indemnity Company, Travelers Property Casualty Company of America, Continental Insurance Company, Continental Casualty Company, Bedivere Insurance Company, ACE American Insurance Company, Century Indemnity Company, Indemnity Insurance Company of North America, California Union Insurance Company, Illinois Union Insurance Company, Westchester Fire Insurance Company, Federal Insurance Company, Great Northern Insurance Company, Vigilant Insurance Company, Allstate Insurance Company, Munich Reinsurance America, Inc., XL Insurance America Inc., XL Select Insurance Company, American Guarantee and Liability Insurance Company, Arrowood Indemnity Company, and Westport Insurance Corporation.

4. The NFL Parties first provided notice of the Underlying Lawsuits to certain of the Insurers, including TIG, by letter dated August 6, 2011 from Marsh, which enclosed an August 2, 2011 letter from the NFL Parties in connection with the Vernon Maxwell lawsuit.

5. The August 2, 2011 letter instructed Marsh to notify the NFL Parties' insurers of the lawsuit but specifically stated that the "NFL and NFL Properties are still studying the Complaint and considering the engagement of defense counsel."

6. The August 2, 2011 letter also advised that the NFL Parties intended to "reserve all of their rights and remedies under the law, at equity, and under any and all potentially applicable insurance policies."

7. Neither the August 2, 2011 letter nor the August 6, 2011 letter requested that the Insurers assume the defense of the lawsuits or assign defense counsel.

8. Attached hereto as **Exhibit A** is a true and accurate copy of the August 6, 2011 notice letter enclosing the August 2, 2011 letter from the NFL Parties.

9. The NFL Parties retained the defense counsel of their choice—the law firm of Paul Weiss Rifkind Wharton & Garson LLP—to defend them in the Underlying Lawsuits.

10. The NFL Parties provided subsequent notice letters to the Insurers regarding the filing of additional lawsuits and their retention of the Paul Weiss firm to defend such lawsuits.

11. Attached hereto as **Exhibit B** is a true and accurate copy of the August 31, 2012 notice letter by way of example.

12. Attached hereto as **Exhibit C** is a true and accurate redacted copy of Travelers' July 3, 2013 letter offering to retain and pay separate and independent defense counsel to represent NFL Properties, as provided to me by Kevin J. O'Connor, counsel for Travelers.

13. Attached hereto as **Exhibit D** is a true and accurate redacted copy of the NFL Parties' August 5, 2013 letter rejecting Travelers' offer, as provided to me by Kevin J. O'Connor, counsel for Travelers.

14. The NFL Parties provided an Invoice History Chart to certain of the defending Insurers in March 2012 and advised that they were in the process of gathering copies of the invoices to send to the Insurers.

15. TIG did not receive defense invoices until mid-April 2012.

16. TIG issued an initial payment of defense costs on June 22, 2012 and a second payment on August 8, 2012, totaling over $1.2 million. TIG has paid $9,865,912.93 in defense

costs on behalf of the NFL Parties to date and continues to fund its share of the substantial invoices submitted on behalf of the NFL Parties.

17. The Insurers sent their first discovery deficiency letter to the NFL Parties on May 31, 2017, expressly identifying the NFL Parties' failure to produce their defense and settlement materials, among many other issues. Additional correspondence was exchanged between the NFL Parties and the Insurers regarding this issue on August 22, 2017 (NFL Parties), October 11, 2017 (Insurers), November 2, 2017 (NFL Parties), and January 17, 2018 (Insurers).

18. The Insurers and the NFL Parties engaged in extensive "meet-and-confer" efforts to resolve their discovery disputes including two formal conference calls that lasted a total of approximately six hours, as well as numerous e-mails and informal calls regarding discovery issues.

19. Based upon the Insurers' review of the NFL Parties' document production in this matter,

REDACTED

20. Attached hereto as **Exhibit E** is a true and accurate copy of the June 1, 2018 status letter sent jointly by the parties to Special Referee Dolinger.

21. Attached hereto as **Exhibit F** is a true and accurate copy of the September 20, 2018 letter from Mark Goodman, Esq. (counsel for Dr. Elliot Pellman) to counsel for TIG regarding the subpoena served upon Dr. Pellman.

Dated: New York, New York
October 11, 2018

By: /s/ Heather E. Simpson
Heather E. Simpson

EXHIBIT A

EXHIBIT A

Edward Hiroshima
Senior Vice President

MARSH

MARSH MERCER KROLL
GUY CARPENTER OLIVER WYMAN

Marsh USA Inc.
1166 Avenue of the Americas
New York, NY 10036-2774
212 345 3439 Fax 212 345 6194
edward.y.hiroshima@marsh.com
www.marsh.com

August 06, 2011 **BY FEDERAL EXPRESS**

Claim Manager
TIG Insurance Company
250 Commercial Street, Suite 500
Manchester, NH 03101

Subject: Notice of Loss, Claim, Incident or Accident To Insurance Company
Insured: National Football League / NFL Properties, LLC
TIG Insurance Company Policy Nos:
CGL: T70003804079001; T70003804079002
Umbrella/Excess: KLB0003803012401; KLB0003803012402
Policy Dates: 11/20/2000-2001; 11/20/2001-2002
Claimant ~ Third Party If Any: Vernon Maxwell, et al

Enclosed, please find a copy of the suit and tender letter concerning this notice. This notice is made upon any and all appropriate policies issued by the addressee Transamerica group insurance companies to the Insured regardless of whether specifically mentioned above or below.

We are still retrieving our files from archives but note that Marsh's relationship with the NFL commenced in 1999. We have been told by the NFL that Transamerica issued liability insurance policies to the NFL prior to that date, including under a Commercial General Liability Policy bearing Policy No. SP-362223041 for the policy period November 20, 1994 to November 20, 1997. We ask that you consider this letter also to constitute notice under such earlier policies and further request that you provide us with copies of such policies."

Please arrange to have this message acknowledged back to all recipients of this notice, including "CC's" along with the assigned case handler's contact information and the assigned claim file number as soon as possible.

Thank you

Sincerely,

Edward Hiroshima
Senior Vice President

Copy:
Anstasia Danias:

Enclosures

NATIONAL FOOTBALL LEAGUE

August 2, 2011

By Electronic Mail (edward.y.hiroshima@marsh.com)

Ed Hiroshima
Marsh USA, Inc.
1166 Avenue of the Americas
New York, NY 10036

Re: *Maxwell, et al. v. National Football League, et al.*, Case No. BC465842

Dear Ed:

As we have discussed, I write on behalf of the National Football League ("NFL") and NFL Properties LLC ("NFL Properties") to request your assistance in promptly reporting and providing notice of the above-referenced lawsuit to our insurers. Please find attached Plaintiffs' Complaint for Damages and Demand for Jury Trial in the case captioned *Vernon Maxwell, et al. v. National Football League, et al.*, Case No. BC465842, filed in the Superior Court of the State of California, County of Los Angeles. Although the above-referenced Complaint was filed on July 19, 2011, to the best of our knowledge defendants have not yet been served.

I ask that you forward this letter and the accompanying Complaint to all insurers that issued the NFL or NFL Properties comprehensive general liability, commercial general liability, or other general liability insurance policies (including primary, umbrella, or excess policies affording such coverage), as well as any other policies that may potentially respond to the Complaint. We ask that you forward this to any and all insurers that issued such policies as to which your firm served as broker, regardless of the policy periods of such policies.

Given that the *Maxwell* Complaint has only recently been filed, the NFL and NFL Properties are still studying the Complaint and considering the engagement of defense counsel. By this letter, we advise our insurers that the NFL and NFL Properties intend to reserve all of their rights and remedies under law, at equity, and under any and all potentially applicable insurance policies. Nothing set forth in this letter is intended or shall be construed to waive or prejudice any rights with respect to our defense of the *Maxwell* lawsuit or insurance coverage for that lawsuit. We fully expect our insurers to honor all of their obligations under their policies, including without limitation their defense-related duties and obligations.

Please provide me with copies of your correspondence forwarding this letter to the insurers in accord with the provisions of our policies. Also, we ask that insurance company representatives receiving this letter note that they should direct any correspondence and comments to the undersigned. In particular, to the extent that any insurers have any requests or

280 Park Avenue, New York, NY 10017 Tel 212.450.2000 Fax 212.697.7463

questions regarding the defense or handling of the lawsuit, we would appreciate hearing from them promptly in that regard.

Sincerely,

Anastasia Danias

Enclosure

cc: John Dutt, Robert Higgins, Charles Moran (Marsh)
Mitchell Dolin (Covington & Burling)
Joseph Siclare (NFL)

EXHIBIT B

EXHIBIT B

NATIONAL FOOTBALL LEAGUE

CONFIDENTIAL INSURER-INSURED COMMUNICATION

REDACTED

REDACTED

Regards,

Anastasia Danias
Vice President
Legal Affairs

Enclosures

cc: John Denton, Esq.

EXHIBIT C

REDACTED

TRAVELERS

Robert J. Keane
Associate Group General Counsel-Liability
Travelers Indemnity Co.
One Tower Square
Hartford CT 06183

Tel: 860-954-1326
e-mail: rkeane@travelers.com

July 3, 2013

Via Federal Express
Ms. Anastasia Danias
Vice President, Legal Affairs
National Football League
345 Park Avenue
New York, NY 10154

Re: Claimants: Various Former NFL Players
Insured: NFL Properties LLC, as successor to NFL Properties, Inc. ("NFLP")
Policy Nos: Northbrook Property and Casualty Insurance Company Policy Nos. BPP0274597 (3/31/84 to 3/31/97) and UKL0272709 (3/31/84 to 3/31/97)

Dear Ms. Danias:

This letter continues the dialogue regarding the need for independent defense counsel for NFL Properties and responds to your letter of February 18, 2013 to Rebecca Williams.

A. Defense Counsel Selection

In your February 18th letter, you conclude that no conflict of interest exists with respect to the common representation of NFL and NFL Properties. Travelers disagrees with that conclusion and continues to believe that the joint or common representation of NFL and NFL Properties by Paul Weiss and other common defense counsel presents an unresolved conflict of interest and is not appropriate. While Travelers has, at all times, stood willing to appoint separate defense counsel to represent the interests of NFL Properties, the NFL, ostensibly on behalf of NFL Properties, has refused to avail NFL Properties of that right. We continue to urge the NFL to reverse course and allow NFL Properties its own independent defense counsel.

Redacted.

Redacted.

As stated at the outset, we urge the NFL to reverse its position on this issue and allow for the appointment of separate defense counsel for NFL Properties. In support of that goal, Travelers is willing to appoint and fund separate and independent defense counsel for NFL Properties. Proceeding in this fashion will eliminate any current (or future) conflict of interest issue, while making certain that NFL Properties has counsel that is free to look out specifically for the interests of NFL Properties. Likewise, engagement of separate defense counsel for NFL Properties will assure that the common interests of NFL Properties and its insurers are both protected and represented and does not interfere with the co-defendants' ability to cooperate where their interests are aligned.

Travelers has experience with a number of firms competent and qualified to represent NFL Properties in this case. They include the following firms: Day Pitney; Choate Hall & Stewart; and DLA Piper. If NFL Properties has other firms it would like to suggest, please identify them for our mutual consideration. Travelers' offer to defend NFL Properties remains subject to a full reservation of rights with respect to both its duty to indemnify NFL Properties in connection with the underlying cases and its right to recoupment or recovery of defense costs from NFL Properties, its other insurers, or any other responsible parties. Nothing contained herein is intended or should be construed as a waiver of any such rights.

Redacted.

Redacted.

Redacted.

Otherwise, please contact me so that we may discuss how to proceed with the assignment of defense counsel for NFL Properties.

I look forward to hearing from you.

Very truly yours,

Robert J. Keane

EXHIBIT D

REDACTED

NATIONAL FOOTBALL LEAGUE

August 5, 2013

By Federal Express and Electronic Mail

Robert J. Keane, Esq.
Associate Group General Counsel - Liability
Travelers Indemnity Co.
One Tower Square
Hartford, CT 06183
rkeane@travelers.com

Re: Former NFL Player Injury Litigation

Dear Mr. Keane:

Redacted.

Second, we continue to reject Travelers' position that there is a "conflict" precluding the joint representation of the NFL and NFL Properties, which was not articulated until long after Travelers acknowledged such joint representation without objection. My prior correspondence dated October 17, 2012 and February 18, 2013 details the history of Travelers' change in position and the lack of substance to that objection. Your letter of July 3, which is the first response we have received to our February 18 letter, continues to adhere to Travelers' assertion of a conflict, despite the fact that we have explained in detail in our prior correspondence why there is no conflict and why Travelers' position, which has not been adopted by any of the NFL parties' other insurers, is unfounded. I will not address herein the remaining points in your letter regarding the alleged conflict, but I do note that Travelers' arguments were adequately put to rest in my letters of October 17 and February 18.

Redacted.

Redacted.

Sincerely,

Anastasia Danias
Vice President, Legal Affairs
National Football League

Enclosure

Redacted.

EXHIBIT E

By Email

June 1, 2018

Hon. Michael H. Dolinger (Ret.)
Special Referee
JAMS
620 Eighth Avenue, 34th Floor
New York, New York 10018
MDolinger@JAMSADR.com

Re: *Alterra America Insurance Co. v. National Football League, et al.*, Index No. 652813/2012**E**
Discovery Property & Casualty Co. v. National Football League , et al., Index No. 652933/2012**E**

Dear Judge Dolinger:

Pursuant to Justice Masley's Order entered May 1, 2018, and your Referee's Order dated May 24, 2018, we write on behalf of all parties to submit certain documents to Your Honor and to provide an update as to the status of discovery in these actions, to address procedures for disposing of discovery disputes, and to propose an agenda for the June 15, 2018 initial conference.

These are insurance coverage actions between (i) the National Football League and NFL Properties (together, "NFL Parties") and (ii) more than 25 liability insurers ("Insurers") that issued (or allegedly issued) policies of insurance to one or both of the NFL Parties during the past approximately 60 years. The actions contain various claims for and defenses to coverage in connection with underlying litigation. That litigation involves claims by thousands of former NFL players seeking to hold the NFL Parties liable for neurological and other injuries that the claimants allege resulted from concussive and sub-concussive impacts sustained while playing football. Further information concerning the nature and history of these actions is outlined in the attached Joint Status Report that the parties provided Justice Masley in August 2017. Also attached is the current case management schedule (as set forth in a Stipulation so ordered by the Court on May 2, 2018).

On Monday, June 4, 2018, the parties will send copies of the operative amended pleadings; the parties' requests for production served on February 1, 2017; the parties' interrogatories served on February 1, 2017; and all prior transcripts from Court conferences. There are no pending discovery motions.

Status of Discovery. The parties have exchanged document requests and interrogatories, and responses and objections thereto. As of May 30, 2018, the NFL Parties have produced approximately 648,438 pages of documents in response to the Insurers' document requests, and the Insurers collectively have produced approximately 445,200 pages of documents in response to the NFL Parties' document requests. The parties have engaged in multiple written and telephonic "meet and confer" efforts on various discovery disputes. Certain of these existing disputes were outlined to the Court in a joint submission dated February 2, 2018 (copy enclosed). Following submission of that letter, it was suggested that the parties consider the retention of a Special Referee, which resulted in your appointment in the May 1, 2018 Order.

Notwithstanding the progress that they have made to date, the parties recognize that there exist several pending, and likely future, disputes that will need to be resolved by Your Honor,

NYSCEF DOC. NO. 486
INDEX NO. 652933/2012
RECEIVED NYSCEF: 04/03/2019

including disputes involving relevancy, privilege, confidentiality, burdensomeness, and other objections.

Procedures for Discovery Disputes. Given the large number of parties and the nature of the issues in these actions, the parties believe that their discovery disputes are best resolved, following appropriate meet and confer efforts, by briefing before Your Honor. For certain of the existing discovery disputes extensive meet and confer efforts already have occurred, and the parties have reached an impasse. That said, we are of course open to any suggestions that Your Honor may have with respect to the most efficient procedures for resolving current and future discovery disputes.

Agenda. In light of the foregoing, the parties propose to address the following issues during the June 15, 2018 initial conference:

- Your Honor's questions regarding the history and status of these actions.
- Procedures for briefing and addressing current and future discovery disputes.
- Setting a briefing schedule on motions that are now ripe for briefing.

* * *

If Your Honor has any questions about any of the foregoing, please do not hesitate to contact us. We very much appreciate your attention to these issues, and look forward to speaking at the initial conference.

Respectfully submitted,

COVINGTON & BURLING LLP

By: _____
Michael E. Lechliter

The New York Times Building
620 Eighth Avenue
New York, NY 10018
(212) 841-1000

Attorneys for Defendants National Football League and NFL Properties LLC

KENNEDYS CMK LLP

By: _____
Christopher R. Carroll

570 Lexington Avenue
New York, NY 10022
(212) 252-0004

Attorneys for Defendants TIG Ins. Co., U.S. Fire Ins. Co., and The North River Ins. Co.

cc: Ms. Shavonne Applewhite
Counsel of Record

EXHIBIT F

Debevoise & Plimpton

Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
+1 212 909 6000

Mark P. Goodman
Partner
mpgoodman@debevoise.com
+1 212 909 7253

September 20, 2018

BY ELECTRONIC MAIL

Mark F. Hamilton, Esq.
Kennedys CMK
120 Mountain View Boulevard
P.O. Box 650
Basking Ridge, New Jersey 07920

Third Party Subpoena to Dr. Elliot Pellman in *Alterra America Insurance Co. v. National Football League, et al.*, Index No. 652813/2012E and *Discover Property & Cas. Co., et al. v. National Football League, et al.*, Index No.: 652813/2012E

Dear Mark,

As you know, we represent Dr. Elliot Pellman in the above-referenced matter. We write in response to your August 14, 2018 letter (the "August 14 Letter") concerning Dr. Pellman's compliance with the third-party subpoena issued to him on or about June 28, 2017 (the "Subpoena"), and in particular (i) to confirm that Dr. Pellman will continue to cooperate in providing responsive documents, despite his belief that the Subpoena's requests are overbroad, unduly burdensome, and seek irrelevant information, and (ii) to otherwise address certain points raised in the August 14 Letter.

The Scope of the Subpoena

As an initial matter, Dr. Pellman continues to disagree that the Insurance companies you represent and/or to which you are liaison counsel (collectively, the "Insurers") are entitled to the incredibly wide-ranging discovery they seek from him. As you know, discovery requests must be "tailored to address only issues framed by the complaint" and to avoid a "fishing expedition." *Russ & Russ v. Chuang*, 52 N.Y.S.3d 248 (N.Y. Sup. Ct. 2017). Only documents that are "material and necessary" are discoverable, and "the need for discovery must be weighed against any special burden to be borne by the opposing party." *Forman v. Henkin*, 30 N.Y.3d 656, 662 (N.Y. 2018). Consistent with the case law, the Preamble to the Commercial Division's Rules of Practice expressly "encourage[s] proportionality in discovery." N.Y.C.R.R. 202.70(g).

Dr. Pellman's primary objection to the Subpoena is that it is excessively broad in scope and, more importantly, seeks documents that should be sought in the first instance from the NFL as a first-party participant in the insurance coverage action. Dr. Pellman is not a party to the insurance coverage action, and it is our understanding that first-party fact discovery in that action has not yet been completed. As we have expressed to you previously, Dr. Pellman believes that the Insurers are likely to receive most or all of the relevant documents that might be within his possession, custody, or control directly from the NFL and that it is unnecessary and burdensome to seek such documents from him before completing first party discovery.

As you have characterized it, the dispute between the Insurers and the NFL focuses on "the extent to which the retired players' injuries were at any point expected or intended from the standpoint of the NFL Parties or known to have been occurring, in whole or in part, by the NFL Parties." August 14 Letter, at 5 (emphasis added). Accordingly, the Insurers are seeking to demonstrate "that the NFL Parties . . . were aware for decades of certain long-term risks of head trauma, but failed to disclosure this information to NFL players (and otherwise sought to obstruct scientific research into the effects of football-related head impacts)." *Id.*

To the extent you are seeking documents Dr. Pellman sent to the NFL, those should be obtained, in the first instance, from the NFL. And, any information that was in fact conveyed to the NFL should be available in discovery from the NFL. If, after first party discovery has been completed, the Insurers believe there are gaps in the information provided in first party discovery that potentially can be filled by the production of documents by Dr. Pellman reflecting his communications with the NFL, it would then be appropriate to identify such gaps and to seek to determine whether Dr. Pellman possesses additional, relevant documents. To the extent you are seeking documents that Dr. Pellman may possess that he did not share with the NFL, please let us know why you believe those documents are relevant to the Insurers' allegations in this case.

Notwithstanding Dr. Pellman's view that third-party document discovery would have been less burdensome and thus more appropriate had it been commenced after the Insurers had completed first party fact discovery, he has cooperated in good faith with counsel for the Insurers and has already made a production of documents comprised of communications to, from, and among Dr. Pellman and other MTBI Committee members concerning head injuries related to football; we anticipate making an additional production of documents later this month or early next month.

On Privilege Issues

It appears from the August 14 Letter that the Insurers may misunderstand our position on the scope of the attorney-client privilege. Dr. Pellman has not withheld from production any documents "based solely on apparent instructions from the NFL Parties that he refrain from producing them because the NFL believes that it *might* have some

basis to assert a privilege." August 14 Letter, at 3. Rather, as we have explained previously, we have identified documents that Dr. Pellman possesses that we believe, based on the substance of the documents, might involve the confidential solicitation and/or provision of legal advice by lawyers representing the NFL that potentially implicate the attorney-client privilege held by the NFL. On that basis, we have turned those documents over to the NFL so that it can determine whether in fact the documents implicate and are protected by its privilege. The documents provided to the NFL do not involve the potential independent assertion by Dr. Pellman of the attorney-client privilege to protect himself separate and apart from the NFL's privilege. If the NFL concludes that documents we have provided for review are not privileged, we will produce the documents to you. As indicated above, we expect to make further production of documents and will include in our production any responsive documents that have been reviewed at our request and cleared for production by the NFL.

The Scope of Dr. Pellman's Productions

In response to the Insurers' request, we are confirming that Dr. Pellman has not refrained from searching for documents on the basis of any of the formal objections set forth in his responses and objections to the Subpoena. Because Dr. Pellman has not yet completed his intended production of documents, we suggest deferring until after production is complete any discussion concerning the sufficiency of the production as to any particular document request, time period, or type of document.

Please let us know if you wish to discuss any aspect of the review and production of Dr. Pellman's documents.

Sincerely,

s/ Mark P. Goodman

Mark P. Goodman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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ALTERRA AMERICA INSURANCE COMPANY, Index No. 652813/2012 **E**

Plaintiff,

-against-

AFFIRMATION OF KEVIN J. O'CONNOR

NATIONAL FOOTBALL LEAGUE AND NFL PROPERTIES, LLC, et al.,

Defendants.

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DISCOVER PROPERTY & CASUALTY COMPANY, et al., Index No. 652933/2012 **E**

Plaintiffs,

-against-

NATIONAL FOOTBALL LEAGUE, NFL PROPERTIES LLC., et al.,

Defendants.

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KEVIN J. O'CONNOR, ESQ., an attorney duly admitted to practice pro hac vice in these actions, hereby affirms the following to be true and under penalty of perjury:

1. I am a shareholder of the law firm of Hermes, Netburn, O'Connor & Spearing, P.C, counsel for Discover Property & Casualty Insurance Company, St. Paul Protective Insurance Company, Travelers Casualty & Surety Company, Travelers Indemnity Company, Travelers Property Casualty Company of America (collectively, "Travelers"), in the above-captioned matter (the "Coverage Action"). As such, I have personal knowledge of the facts

stated herein, the source of my knowledge being the records and files maintained by my office in the ordinary course of handling this matter.

2. I respectfully submit this Affirmation in support of the Insurers' Reply Memorandum of Law in Support of Motion to Compel Production of Underlying Litigation and Settlement Materials from the National Football League and NFL Properties LLC (the "Motion").

3. I have the Affirmation of Heather E. Simpson submitted in support of the Motion, including Exhibits C and D to that Affirmation.

4. The document attached to the Affirmation of Heather E. Simpson as **Exhibit C** is a true and accurate copy of Travelers' July 3, 2013 letter offering to retain and pay for separate and independent defense counsel to represent NFL Properties, as redacted by me.

5. Attached to the Affirmation of Heather E. Simpson as **Exhibit D** is a true and accurate copy of the NFL Parties' August 5, 2013 letter rejecting Travelers' offer to retain and pay for separate and independent defense counsel to represent NFL Properties, as redacted by me.

Dated: Boston, Massachusetts
October 11, 2018

By: /s/ Kevin J. O'Connor
Kevin J. O'Connor